U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0227 BLA

JERRY L. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 04/15/2020
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05371)

of Administrative Law Judge Carrie Bland on a subsequent claim[1] filed on October 29, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 25.32 years of underground coal mine employment[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because she had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, but nevertheless contends the

[1] Claimant filed an initial claim on March 26, 2002, which the district director denied because he did not establish any element of entitlement. Director's Exhibit 1.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

administrative law judge erred in finding it did not rebut the presumption.[5] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting employer forfeited its Appointments Clause challenge and urging the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer's Brief at 6-9. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges on December 21, 2017,[7] but maintains the ratification was

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.305(b), 725.309(c); Decision and Order at 23.

[6] *Lucia* involved an Appointments Clause challenge to the selection of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[7] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[8] *Id*. In response, the Director asserts employer forfeited its Appointments Clause challenge. Director's Response Brief at 3-5. We find employer waived its Appointments Clause challenge.

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). Employer filed a February 22, 2018 motion requesting the administrative law judge hold this case in abeyance pending the decision in *Lucia*. Before the administrative law judge ruled on the motion, the Supreme Court decided *Lucia* on June 21, 2018. Thereafter the administrative law judge issued a September 18, 2018 Notice and Order directing employer to specify "what, if any, further relief it requests" in light of *Lucia*. September 18, 2018 Notice and Order. The administrative law judge indicated if employer did not file a response, she would assume "no further relief is requested." *Id*. Employer did not respond to the Notice and Order.

Employer's assertion administrative law judges cannot resolve constitutional issues is not a valid basis for excusing its failure to pursue an Appointments Clause challenge when it had an opportunity to do so before the administrative law judge. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna v. Matson Terminal Inc.*, __ BRBS __, BRB No. 19-0103, slip op. at 4 (June 25, 2019) (Appointments Clause argument is an "as-applied" challenge the administrative law judge can address and thus can be waived or forfeited); Director's Brief at 5. Had employer responded to the Notice and Order and requested reassignment, the administrative law judge could have, if appropriate, referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna*, BRB No. 19-0103, slip op. at 4-5.

Based on these facts, we conclude employer waived its Appointments Clause

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Secretary's December 21, 2017 Letter to Administrative Law Judge Bland.

[8] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

challenge.[9] *See Powell*, BRB No. 18-0557 BLA, slip op. at 4*; Kiyuna*, BRB No. 19-0103, slip op. at 4. We therefore deny the relief requested.[10]

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 5-6. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting).[11] Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

[9] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U. S. 725, 733 (1993), *quoting Johnson v. Zerbst*, 304 U. S. 458, 464 (1938).

[10] Employer also waived its related argument that the Secretary of Labor's ratification of the administrative law judge's appointment on December 21, 2017, was invalid since it had the opportunity to also raise this issue in response to the administrative law judge's Notice and Order but failed to do so.

[11] Furthermore, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

Rebuttal of Section 411(c)(4)

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither legal nor clinical pneumoconiosis[12] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.

We affirm the administrative law judge's finding employer failed to disprove the existence of clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24-25. Employer's failure to disprove clinical pneumoconiosis precludes finding claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. Dr. Sargent initially diagnosed an irreversible obstructive ventilatory impairment consistent with smoking-related emphysema. Employer's Exhibit 2 at 2. He opined coal mine dust exposure does not cause pulmonary emphysema, and thus claimant does not have legal pneumoconiosis. *Id.* In a supplemental report, he agreed with the additional diagnosis of asthma in claimant's treatment records. Employer's Exhibit 15 at 1. He opined claimant's pulmonary function testing showing a thirty-two percent "improvement in FEV1 following [the] administration of [a] bronchodilator" indicates claimant does not have legal pneumoconiosis. *Id.* He explained "any impairment that reverses with bronchodilator treatment cannot be attributed to coal [mine] dust exposure." Employer's Exhibit 15 at 1. As claimant's obstructive impairment improved by only thirty-two percent after bronchodilation, and thus was not fully reversible, the administrative law judge permissibly found Dr. Sargent did not adequately address why coal mine dust exposure was not a cause of the irreversible portion

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

of the impairment. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 27.

Dr. Sargent also explained an impairment "due to coal [mine] dust exposure does not suddenly appear after mining ceases. It develops and progresses based on ongoing dust exposure." Employer's Exhibit 15 at 1. Because claimant continued to smoke cigarettes after leaving coal mining and did not exhibit obstructive respiratory symptoms until years later, Dr. Sargent opined claimant's coal mine dust exposure did not cause his obstructive impairment. *Id*. The administrative law judge permissibly found this reasoning contrary to the principle that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion that is not in accord with the accepted view that pneumoconiosis is both latent and progressive may be discredited); 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 27. Further, the administrative law judge permissibly found while Dr. Sargent identified smoking as the cause of claimant's obstructive impairment, he did not adequately explain why coal mine dust exposure was not a significant contributor or substantial aggravator. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); Decision and Order at 25-26.

Dr. McSharry diagnosed chronic obstructive pulmonary disease (COPD) with associated hypoxemia. Director's Exhibit 16 at 3. He opined claimant's COPD and hypoxemia are due to his cigarette smoking and unrelated to his coal mine dust exposure. *Id*.; *see also* Employer's Exhibits 14, 17. He explained COPD is a disease "commonly seen in the general population of smokers" and thus claimant's impairment can be explained entirely by his smoking history. *Id*. Contrary to employer's argument, the administrative law judge permissibly found Dr. McSharry's rationale unpersuasive because although he attributed claimant's COPD and hypoxemia to his smoking, he did not explain why they were not significantly related to, or substantially aggravated by, his coal mine dust exposure. *See Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); Decision and Order at 25-26.

Employer's arguments[13] are a request that the Board reweigh the evidence, which it is not empowered to do.[14] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 25-26.

With respect to the second method of rebuttal, the administrative law judge permissibly found the same reasons for discrediting Dr. Sargent's and Dr. McSharry's opinions that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's total disability is unrelated to his legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Epling*, 783 F.3d at 504-05; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 26-27.

Further, she rejected their opinions that no part of claimant's total disability was caused by clinical pneumoconiosis. Decision and Order at 27. Dr. Sargent acknowledged claimant has clinical pneumoconiosis, but indicated "[l]ow profusion coal workers' pneumoconiosis is frequently not associated with any ventilatory impairment," and thus claimant's disability is not due to clinical pneumoconiosis. Employer's Exhibit 2 at 2. Dr. McSharry opined clinical pneumoconiosis is "not associated with any pulmonary function abnormalities or arterial blood gas abnormalities." Director's Exhibit 14 at 2. He indicated when coal workers' pneumoconiosis causes "abnormalities," it does so in the setting of advanced severe pneumoconiosis, generally with progressive massive fibrosis."[15] *Id*. As the administrative law judge noted, however, claimant need not establish complicated pneumoconiosis to invoke the Section 411(c)(4) presumption and, once invoked, he is

[13] Contrary to employer's argument, the administrative law judge permissibly assigned little weight to the medical evidence from claimant's prior claim because of its age and the progressive nature of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); Decision and Order at 23; Employer's Brief at 11-12.

[14] We need not address employer's argument the administrative law judge erred in crediting Dr. Ajjarapu's opinion that claimant has legal pneumoconiosis. Employer's Brief at 15-18. Because it is employer's burden to establish claimant does not have pneumoconiosis, any error the administrative law judge committed in weighing claimant's evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); 20 C.F.R. §718.305(d)(1)(i).

[15] Complicated pneumoconiosis is also known as "progressive massive fibrosis." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

presumed to be totally disabled due to simple clinical pneumoconiosis. 20 C.F.R. §718.305(c)(1); Decision and Order at 27. The administrative law judge thus permissibly found their opinions unpersuasive and insufficient to establish no part of claimant's total disability was caused by clinical pneumoconiosis. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We therefore affirm the administrative law judge's determination that employer failed to rebut pneumoconiosis as a cause of claimant's disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge